

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
May 2000 Session

**APRIL LEIGH BURKHART v. JASON TODD BURKHART**

**Appeal from the Chancery Court for Stewart County**  
**No. 98-8-283      Robert E. Burch, Chancellor**

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**No. M1999-02332-COA-R3-CV - Filed August 31, 2000**

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This is a divorce case. The trial court awarded the divorce to the father on the ground of the mother's inappropriate marital conduct and awarded custody of the minor child to the father. The mother appeals the award of the divorce and custody of the child to the father. We modify the award of the divorce, relying instead on Tenn. Code Ann. § 36-4-129(b), and "declare the parties to be divorced, rather than awarding a divorce to either party alone." We affirm the award of custody of the minor child to the father.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified, and Remanded.**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and WILLIAM C. KOCH, JR., J., joined.

Steven T. Atkins, Clarksville, Tennessee, for the appellant, April Leigh Burkhart.

Clifford K. McGown, Jr., Waverly, Tennessee, for the appellee, Jason Todd Burkhart.

**OPINION**

This case involves the dissolution of a marriage of relatively short duration between Jason Todd Burkhart ("Father") and April Leigh Burkhart ("Mother"). The parties married in 1995 and have one child, a daughter, born the same year. They separated in September 1998, and Mother filed for divorce, alleging irreconcilable differences and unspecified inappropriate marital conduct. Father filed an answer and counter complaint also alleging irreconcilable differences and inappropriate marital conduct on the part of Mother. The trial court granted the divorce to Father and awarded custody to Father. Mother appeals these rulings.

Our review of the issues raised by mother is governed by Tenn. R. App. P. 13(d). Under that standard, we review the findings of fact by the trial court *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the

evidence is otherwise. *See* Tenn. R. App. P. 13(d). Because the trial judge is in a better position to weigh and evaluate the credibility of the witnesses who testify orally, we give great weight to the trial judge's findings on issues involving credibility of witnesses. *See Gillock v. Board of Prof'l Responsibility*, 656 S.W.2d 365, 367 (Tenn. 1983). Conclusions of law are not afforded the same deference. *See Brock v. Brock*, 941 S.W.2d 896, 898 (Tenn. Ct. App. 1996).

### I. Grounds for Divorce

At trial, Mother testified that the inappropriate marital conduct she complained of included Father's controlling and dominating manner, physical and emotional abuse, and his threats of suicide.<sup>1</sup> She stated that whenever they had arguments, Father told her to take her things and leave without their child. She recounted episodes where Father threatened to commit suicide, the last occurring while their daughter was in the house. The alleged incident involved Father putting a gun to his mouth and threatening to kill himself if she left with the child. She testified to Father smashing in the windshield to her Jeep, shooting out a tire, and leaving a bullet hole in the side of the Jeep. She also stated he had burned some of her clothes once when she attempted to leave him. In her deposition, which was entered into the record, she also testified that Father had hit and kicked her on different occasions.

Mother portrayed Father as violent or unpredictable when angry, and stated he harassed or called her constantly at work after their last fight. That afternoon, he left work early in her car, apparently went home and exchanged vehicles, and totaled his truck in a wreck. That was the same afternoon that Father intentionally damaged Mother's Jeep. Mother's primary complaint was Father's alleged abuse of prescription drugs, sometimes coupled with alcohol. She claimed Father complained of migraine headaches so he could get drugs. Among other things, she claimed that Father had been "on Xanax real bad," that he obtained painkillers and other medication from other people, and that co-workers had mentioned to her that they had noticed Father was impaired on some occasions. She also recounted an occasion when Father telephoned a pharmacy and had a prescription for her own pain medication changed to a stronger one. She said Father had taken most of those pills.

Mother provided no witnesses to Father's alleged drug and alcohol abuse, nor to his alleged suicide attempt. Father produced witnesses who testified that they knew him well, were in frequent contact with him over a number of years, and that he did not abuse alcohol or drugs. Father testified that he had migraine headaches, starting about four and one half years before the hearing, and that his doctors had tried various kinds of prescription medicines to treat the migraines. He had been referred to and had seen a psychiatrist. He claimed never to have threatened suicide and denied having a drug or alcohol problem. He admitted shooting Mother's Jeep and breaking the windshield. He was not questioned about violence toward Mother.

Father's psychiatrist, Dr. Stalford, testified that Father had been referred to her by his

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<sup>1</sup>The trial court limited Mother's testimony to the grounds she had disclosed in her deposition.

physician because of his migraines, his depression, and his stress and anxiety over the separation. She said he showed no signs of doctor shopping and was happy to try non-narcotic drugs to treat his migraines. Dr. Stalford testified that Father was concerned that Mother might make allegations regarding drug abuse and requested weekly drug screening. The doctor refused to do weekly tests because there was no indication of need. She did one drug test, however, after Father said he had been offered drugs at work and was afraid Mother was trying to set him up. The test showed no drug use and was negative for amphetamines, barbiturates, cocaine, opiates, PCP, and marijuana. Dr. Stalford testified that Father was sad about the separation from Mother and child, that he was losing sleep, losing weight, and having crying spells, but under the circumstances, his problems were not excessive.

When asked to comment on Mother's deposition, the doctor testified that individuals cannot call a pharmacy and change a prescription. She said she had seen no indication of suicidal behavior in Father and that she did not believe that he had drunk alcohol as Mother stated because alcohol triggers migraines. The doctor also disputed Mother's claim that Father was "on Xanax real bad," because withdrawal from Xanax is difficult and dangerous, sometimes lethal, usually requiring hospitalization. Having reviewed his prior medication, the psychiatrist testified that doctors try different medications for treatment of migraines to find the best one for that patient, and that Father's medication was primarily non-narcotic, and thus not addictive. She acknowledged that Father had told her he had gotten other medication from other people on at least one occasion, but considered this an example of his honesty.

Father's examples of Mother's inappropriate marital behavior consisted only of statements that she had a temper and was sometimes hard to please. He and other witnesses recounted an episode about a month after the separation in which Mother "lost it" and began screaming at Father in front of friends and his mother.

The trial court found that the grounds initially alleged by both parties to be insufficient grounds for divorce, and the decree of divorce states:

1. The Court heard testimony of intemperate behavior on behalf of both parties. That behavior (the Husband's vandalism of the Wife's automobile and the Wife's "going off") were not in and of themselves sufficient to grant either of the parties a divorce. The Wife's grounds for divorce consist of her allegation that the Husband abused drugs and had attempted suicide. Those allegations were shown by the evidence to be false. The Wife presented no other grounds. The proof shows that there was no reasonable basis for the Wife to believe the allegations of drug use and suicide attempts by the Husband. Further, the Court finds that those allegations were made maliciously.
2. The Husband's factual allegations for divorce consisted essentially of the Wife being hard to please and hard to live with. The Court finds that this does not constitute grounds for divorce either.

3. Although the factual grounds for divorce submitted to the Court by the parties do not constitute grounds for divorce, the false and malicious allegations of the Wife against the Husband constitute a separate, independent basis for a divorce. It has long been established in Tennessee that false allegations of adultery constitute cruel and inhuman treatment, even when those allegations are made after the separation or during the course of the divorce action itself. The Wife's allegations of drug use and addiction and suicide attempts by the Husband have essentially the same effect. The Husband is, therefore, entitled to and granted a divorce from the Wife on the grounds of inappropriate marital conduct.

Mother appeals the trial court's granting the divorce to Father, arguing that neither party was entitled to a divorce if neither proved grounds, and that the court erred by granting the divorce on the basis of disbelieving Mother.

Inappropriate marital conduct, formerly known as cruel and inhuman treatment, is defined in our statutes as "such cruel and inhuman treatment or conduct towards the spouse as renders cohabitation unsafe and improper. . ." Tenn. Code Ann. § 36-4-101(11) (Supp. 1999). While there appears to be some lack of unanimity in appellate decisions on the specific words to be applied in interpreting the statutory language, the basic question remains whether either or both of the parties engaged in a course of conduct which (1) caused pain, anguish or distress to the other party and (2) rendered continued cohabitation "improper," "unendurable," "intolerable" or "unacceptable." See Tenn. Code Ann. § 36-4-101(11); *Gardner v. Gardner*, 104 Tenn. 410, 412, 58 S.W. 342, 343 (1900); *Garvey v. Garvey*, 29 Tenn. App. 291, 299-300, 203 S.W.2d 912, 916 (1946); *White v. White*, Carrol Eq. No. 3, 1988 WL 101253 at \*1 (Tenn. Ct. App. Oct. 3, 1988) (no Tenn. R. App. P. 11 application filed); *Brown v. Brown*, No. 02A01-9108-CV-00168, 1992 WL 5243 at \*3 (Tenn. Ct. App. Jan. 16, 1992) (no Tenn. R. App. P. 11 application filed).

These parties appear to have agreed on almost everything related to their divorce, except custody. Even on that issue, prior to trial, the parties had agreed on an arrangement which provided almost equal time for each parent with their child. Because custody was viewed by each party as the most important issue at trial, most of the testimony relates to that issue, with each parent trying to establish that he or she was relatively more fit. However, the testimony as a whole provides some insight into the parties' relationship. In addition to the specific incidents occurring around the time of the separation, it is clear that the parties' marriage was accurately described as "chaotic" at times. Whenever there were arguments, the parties threatened to leave or told the other party to leave. They had at least once previously agreed to a divorce. Each party sought a divorce in this proceeding, and each claimed that continued cohabitation was no longer proper. Prior to Mother's appeal, both agreed that continued cohabitation was improper, intolerable, or unacceptable.

The trial court found that Mother's accusations of drug abuse and suicide attempts by Father were false and malicious. The evidence does not preponderate against that finding, especially in view of the psychiatrist's testimony clearly refuting some of Mother's specific allegations. The trial court found Mother's false allegations were inappropriate marital conduct.

“It is a well-settled rule in this jurisdiction that falsely accusing a [spouse] of adultery constitutes cruel and inhuman treatment.” *Evans v. Evans*, 558 S.W.2d 851, 854 (Tenn. Ct. App. 1977) (citing *Cadle v. Cadle*, 191 S.W.2d 561, 562 (Tenn. Ct. App. 1945)) The court in *Cadle* described such false allegations of adultery against the wife as “offering such indignities to her person as to render her condition intolerable and justify her withdrawal.” *Cadle*, 191 S.W.2d at 562. “Numerous cases in Tennessee have held that false charges of adultery constitute cruel and inhuman treatment as a ground for divorce.” *Reitano v. Reitano*, 52 Tenn. App. 289, 304, 373 S.W.2d 213, 219 (1963). This court has, on at least one occasion, extended the theory that false allegations create grounds for divorce to allegations other than adultery. *See Moore v. Moore*, Shelby Eq. No. 17, 1989 WL 51620 at \*1 (Tenn. Ct. App. May 16, 1989) (perm. app. denied Nov. 27, 1989). In *Moore*, the wife had made allegations of physical and sexual abuse of the parties’ children against the husband. The trial court found those allegations to be false and malicious and to constitute cruel and inhuman treatment, then granted the divorce to the Father based on the false, malicious allegations. This court found the evidence contained in the record insufficient to reverse those findings. *See Moore*, 1989 WL 51620 at \*1; *see also Lyle v. Lyle*, 6 S.W. 878, 879 (Tenn. 1888) (husband’s accusations that wife was a liar, along with accusations of adultery, were part of a pattern of “rendering such indignities to her as rendered her condition intolerable”).

Mother accused Father of abusing drugs, specifically painkillers. This allegation was made in the course of the divorce proceedings but was also made during the marriage. Father testified that Mother would “throw that in my face” when he came home from the doctor with a new prescription. She also made the allegation in front of others. We are convinced that Mother’s pattern of accusing Father of abuse of drugs, when the evidence indicates he was prescribed various medications to treat his migraine headaches, was part of the conduct which contributed to the deterioration of their marriage.

Our courts have often recognized a pattern of misconduct as constituting inappropriate marital conduct. *See Brown*, 1992 WL 5243 at \*3. However, we recognize that a single incident, if severe enough, can also render cohabitation improper, unendurable, intolerable, or unacceptable. In its finding that Mother had not proved inappropriate marital conduct on the part of Father, the trial court stated from the bench, “[I]solated incidents that were done under pressure, essentially do not constitute grounds for divorce. . . . And that’s the malicious shooting of the wife’s Jeep . . . I think maybe everybody is entitled to one or two of those.”

We cannot agree that everyone is entitled to one or two incidents of shooting and vandalizing a spouse’s vehicle. Especially in view of Mother’s testimony regarding the tension between the parties leading up to that incident, the same day Father “totaled” his truck, we are of the opinion that Mother proved inappropriate marital conduct on the part of Father that made continued cohabitation unacceptable.

The pleadings and evidence herein are clear that neither party has any intention or desire to re-establish or maintain a marital relationship. Both parties’ actions and statements establish the undisputed fact that their prior conduct toward each other has caused pain and distress such that each

party has determined that cohabitation is improper, unendurable, and unacceptable.

Tenn. Code Ann. § 36-4-129(b) (Supp. 1999) authorizes a court to declare the parties divorced, regardless of which party may be more at fault, when there is proof that would entitle either or both parties to a divorce, i.e., proof of one of the statutory grounds for divorce. We have reviewed the entire record in this case and find conduct constituting inappropriate marital conduct on the part of each party. Therefore, we modify the trial court's award of the divorce to Father and declare the parties divorced pursuant to Tenn. Code Ann. § 36-4-129(b).

## II. Child Custody

The primary issue in this case is the custody of the parties' daughter. The trial court awarded custody of the child to Father, but awarded "greater than normal" visitation to Mother. Mother appeals, claiming she should have custody of the child.

Our courts make no more important decisions than those involving the custody of children. When called upon to order a custody arrangement, a court must consider many factors and make a custody determination based on the best interest of the children. *See* Tenn. Code Ann. § 36-6-106 (Supp. 1999) (listing the factors for the court to consider).

In child custody cases, the welfare and best interest of the children are the paramount concern, and the determination of the children's best interest must turn on the particular facts of each case. *See Akins v. Akins*, 805 S.W.2d 377, 378 (Tenn. Ct. App. 1990) (citing *Holloway v. Bradley*, 190 Tenn. 565, 570-72, 230 S.W.2d 1003, 1006 (1950)). In *Holloway*, the Court stated:

The determining facts in these adoption and custody cases are so infinite in their variety that the reported decision in one case is of little aid or assistance in settling the next. The supreme rule to which all others should yield is the welfare and best interest of the child.

*Holloway*, 190 Tenn. at 571, 230 S.W.2d at 1006.

Where, as here, both parents seek custody, this court has held that the child's best interest is to be determined by using an analysis of the comparative fitness of each parent. *See Bah v. Bah*, 668 S.W.2d 663, 665-66 (Tenn. Ct. App. 1983).

We adopt what we believe is a common sense approach to custody, one which we will call the doctrine of "comparative fitness." The paramount concern in child custody cases is the welfare and best interest of the child. *Mollish v. Mollish*, 494 S.W.2d 145, 151 (Tenn. App. 1972). There are literally thousands of things that must be taken into consideration in the lives of young children, *Smith v. Smith*, 188 Tenn. 430, 437, 220 S.W.2d 627, 630 (1949), and these factors must be reviewed on a comparative approach:

Fitness for custodial responsibilities is *largely a comparative matter*. No human being is deemed perfect, hence no human can be deemed a perfectly fit custodian. Necessarily, therefore, the courts must determine which of two or more available custodians is more or less fit than others. *Edwards v. Edwards*, 501 S.W.2d 283, 290-291 (Tenn. App. 1973) (emphasis supplied).

*Id.*, 668 S.W.2d at 666.

Because the determination of where a child's best interest lies is the result of the consideration of a number of factors in the context of a specific factual situation, *see Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997), it is particularly fact-driven. *See Rogero v. Pitt*, 759 S.W.2d 109, 112 (Tenn. 1988). Such decisions often hinge on the trial court's assessment of the demeanor and credibility of the parents and other witnesses. *See Adelsperger*, 970 S.W.2d at 485. Consequently, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *See Rutherford v. Rutherford*, 971 S.W.2d 955, 956 (Tenn. Ct. App. 1997) (quoting *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996)). Accordingly, this court will decline to disturb the custody decision of the trial court herein unless that decision is based on a material error of law or the evidence preponderates against it. *See Adelsperger*, 970 S.W.2d at 485.

In this case, no testimony reflected badly on either party as a parent. In its order, the trial court found that both parties were care givers to the child and that "[t]his is a case where the Court is permitted to choose between two good parents rather than between a good parent and a bad parent." In awarding custody to Father, the court found:

The Husband has spent more time with the child than the Wife. The Husband and his family are more involved with the child and with her welfare, both before and after the parties separated. The Court also notes that the Wife has been intentionally untruthful and cannot be trusted to follow the Court's orders concerning custody and visitation.

Mother argues that she has been primarily responsible for the care of the child, that she spent more time with the child, and that she is more stable than Father. Mother also argues that the court awarded custody to Father in an effort to punish her for making false allegations against Father. Mother correctly asserts that custody "should not be a tool for punishment of bad behavior." *See Adelsperger*, 970 S.W.2d at 485. Disregarding the trial court's negative assessment of Mother's credibility in her accusations against Father, however, when we look at the evidence presented to the trial court regarding the comparative fitness of the parents, we cannot say that the evidence preponderates against the trial court's finding that custody with Father was in the best interest of the child.

The court heard evidence that both parents cared for the child, and that both parents loved

her. The court also heard testimony that Father planned to remain in the marital home, next to his parents' home and near his brother and sister. Thus, Father was able to keep the child in the home where she had grown up, surrounded by her extended family. The court also heard testimony that Father sought counseling for his own problems following the separation, but that one of his first questions of his psychiatrist was how he could help his daughter deal with the divorce. The court heard testimony that Father was quick to make sacrifices for his daughter, and was willing to put the parties' differences aside for the sake of the child. Father was said to care for the child when she was sick and to have a good relationship with her. While there was similar testimony regarding Mother's love and care for the child, the court was called upon to decide comparative fitness and to order a custody arrangement in the child's best interest. Upon review of the entire record herein, we decline to second guess the trial court, and we affirm the award of custody.

While we affirm the award of custody to Father, we must address the trial court's prediction that Mother "cannot be trusted to follow the Court's orders concerning custody and visitation." The evidence showed that, long before the trial, the parties had agreed between themselves to split custody of the child, and the arrangement between them had worked satisfactorily for several months. The trial court, in its ruling from the bench, acknowledged that "these people, although they are having their problems, have gotten along well enough where the child is involved." Thus, no support exists for the court's prediction that Mother might disobey the Court's orders regarding visitation. A trial court's duty is to set custody and visitation in such a manner as to best provide for the welfare of the child. We are convinced the trial court herein did just that; however, comments regarding the court's trust in mother to follow orders could imply that the court determined custody on an inappropriate basis, which is the conclusion drawn and argued by Mother<sup>2</sup>. Because the evidence does not preponderate against the trial court's award, when appropriate factors are considered, we affirm the award of custody to Father.

### III. Conclusion

We modify the trial court's granting of the divorce to Father, instead declaring the parties to be divorced pursuant to Tenn. Code Ann. § 36-4-129(b). We affirm the award of custody of the

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<sup>2</sup>We note that a parent's veracity has been determined to be a factor which may properly be considered in making a custody determination. See *Gaskill v. Gaskill*, 936 S.W.2d 626, 634 (Tenn. Ct. App. 1996).



child to Father. This case is remanded to the trial court for such proceedings as are necessary. Costs are taxed to Mother, April Leigh Burkhart, for which execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE